



## CAN YOU DO THAT WITHOUT A WORK VISA?: UNDERSTANDING THE GENERAL PARAMETERS OF THE U.S. BUSINESS VISITOR CATEGORY



December 2018

As immigration practitioners, we are frequently asked by corporate clients whether certain types of commercial activities can be undertaken in business visitor status, or whether a work visa would be required instead. While every case must necessarily be examined individually based on the particular facts of the case, this paper sets forth some key principles governing the general scope of the business visitor category and the types of activities for which business visitor status would typically be appropriate.

### Who Qualifies for B-1 Business Visitor Status?

Under U.S. immigration law, business visitor status falls under the “B-1” visa category. In general, to qualify for B-1 business visitor status, a traveler must:

- Be employed and paid from abroad by a foreign employer outside the U.S.;
- Be entering the U.S. on a temporary basis, for a limited duration;
- Intend to depart the U.S. at the expiration of the temporary stay;
- Maintain a foreign residence in the home country to which the traveler intends to return;

- Have adequate funds or financial arrangements for the visit and the return trip home; and
- Engage solely in business activities that are deemed permissible in B-1 status and that are associated with international trade or commerce and are primarily for the benefit of the traveler’s foreign employer and its business.

### What Sort of Activities Are Permissible in B-1 Business Visitor Status?

The meaning and scope of the term “business”, as used in the context of the U.S. business visitor visa category, is not always readily apparent. U.S. visa regulations define the term “business” in very general terms as referring to “conventions, conferences, consultations and other legitimate activities of a commercial or professional nature.” These same regulations make clear, however, that the term “business” does not include “local employment or labor for hire.”

The question then becomes, at what point does a business activity cross the line into productive U.S. employment, such that business visitor status is no longer appropriate and some type of work visa becomes necessary?

For more information, please contact:



Michael F. Turansick  
mturansick@fragomen.com  
+1 312 499 2804



Kevin C. Aiston  
kaiston@fragomen.com  
+1 312 499 2812

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Activities that would clearly fall on the “business” side of the line would include attending business meetings, trade shows, conferences, and conventions, and meeting with prospective and current customers, suppliers, or distributors to discuss business relations or negotiate international commercial transactions.

The business visitor category has also been interpreted to include other activities that one might not immediately associate with a traditional business trip. For example, business visitor status may be appropriate for individuals engaged in extended but temporary stays in the U.S. to undertake research on a foreign employer’s behalf, such as market research to assess where to focus sales within the U.S. or to evaluate the feasibility of opening a U.S. branch office.

In addition, the B-1 business visitor category may be used to receive training in the U.S., provided certain criteria are met, including that:

- The trainee remains employed and paid by his or her foreign employer during the training period in the U.S.;
- The planned training is generally not available in the trainee’s home country;
- The trainee will not be placed in a position which is in the normal operation of a U.S. business and in which U.S. workers would normally be employed;
- The trainee will not engage in productive employment unless any such employment is merely incidental to, and necessary to, the training; and
- The training is for the benefit of the trainee and the trainee’s foreign employer and is intended to be used by the trainee in his or her foreign employment after returning to the home country.

It is important to note that internships are not permissible in B-1 business visitor status, unless the internship meets the criteria for B-1 training set forth above. This is true even if the internship is unpaid.

Foreign students normally would not meet the criteria for a B-1 trainee, since they typically would not have a foreign employer that was sending them to the U.S. for training. As such, foreign students seeking to gain practical experience through on-the-job training, even in an unpaid internship capacity, generally would not be eligible for B-1 business visitor classification and normally would need to obtain a special J-1 or H-3 trainee visa, or would need to independently qualify for a work visa.

Although employment in the U.S. is not permitted in B-1 business visitor status, there are a handful of very narrowly defined exceptions to the general rule against performing services in B-1 status, provided the foreign national visitor continues to be employed and paid from abroad and the case falls within certain specific defined parameters.

One such exception that is of particular note to German manufacturers exporting goods to the U.S. is the so-called “after-sales service” rule. Under this rule, B-1 business visitor classification would generally be appropriate for a foreign national employed abroad by a foreign manufacturer who is coming to the U.S. to install, service, or repair commercial or industrial equipment or machinery manufactured by the foreign national’s employer outside the U.S., or to train U.S. workers on such equipment or machinery, provided the contract of sale between the foreign manufacturer and the U.S. buyer specifically requires the foreign seller to provide such services or training, and provided further that the foreign national possesses specialized knowledge essential to the seller’s contractual obligation to provide such installation, servicing, repair, or training.

It is important to note, however, that U.S. regulations expressly prohibit foreign nationals in B-1 business visitor status from performing any “building or construction work, whether on-site or in plant.” As such, while installation in the U.S. of equipment manufactured and sold by a foreign seller located outside the U.S. may be permissible in B-1 business visitor status if the criteria specified above are met,

the installation cannot involve the performance of building or construction work by the foreign national. However, the regulations do permit foreign nationals employed by a foreign seller to supervise or train U.S. workers engaged in building or construction work in connection with the installation of foreign-made machinery or equipment purchased from abroad, if such supervision or training is being provided pursuant to the foreign seller's obligations under its sales contract with the U.S. buyer.

Administrative interpretations of the B-1 business visitor category include a handful of other exceptions to the general rule that a foreign national cannot provide services in B-1 business visitor status. For example, a foreign national residing abroad who is a member of the Board of Directors of a U.S. corporation generally may be admitted in B-1 business visitor status to attend a board meeting or perform other functions resulting from membership on the board. In addition, certain domestic servants of foreign nationals in the U.S. on temporary worker visas may potentially qualify for B-1 business visitor classification to accompany their employer to the U.S. during the employer's temporary work assignment in the U.S., if certain specified criteria are met, including that the domestic servant has worked for the employer for at least one year or that the employer has regularly employed domestic workers, the servant has at least one year of experience as a domestic worker, and the parties have entered into a written contract that contains certain required terms, including payment of the prevailing wage and provision of free room, board, and transportation for the servant.

In the past, U.S. authorities have also recognized an exception allowing foreign nationals with professional credentials in a specialty field, such as engineers, to provide services at a professional level in the U.S. on a temporary basis in B-1 business visitor status, as long as the individual remains employed and paid by a foreign employer, receives no remuneration from a U.S. source, and will return to their foreign employ after their temporary stay in the U.S. While this exception has not been formally abolished, it is fallen into disfavor over time, is rarely used, and to the extent it is still allowed, is generally very narrowly construed.

In this regard, it should be noted that the current Administration has announced its intention to propose revised regulations governing the B-1 business visitor category, with a current target promulgation time frame of late 2019. According to the Department of Homeland Security's regulatory agenda, the stated purpose of the planned new regulations is to "ensure fair and consistent adjudication and enforcement, as well as to make the criteria more transparent." Although the contents of the planned new regulatory proposal are not known, it would not be surprising, given the current more restrictive immigration climate, if the proposed regulations sought to narrow the scope of permissible activities under the B-1 category, including possibly formally abolishing the now rarely used exception for professionals employed and paid from abroad providing professional-level services on a temporary basis in business visitor status.

## How Does One Secure Business Visitor Status?

B-1 business visitor status may be obtained in one of two ways. The traveler may apply for a B-1 visa at a U.S. Consulate in the individual's home country. This requires completing a detailed on-line application, followed by an appointment for an in-person interview at the Consulate with a U.S. consular officer. Depending on the particular nationality of the applicant, B-1 visas are usually issued for multi-year, multiple-entry validity periods (Germans are typically issued 10-year multiple entry visas), with the length of stay of each visit determined by the U.S. Customs and Border Protection (CBP) officer at the port-of-entry. Although the holder of a B-1 visa may be admitted for a period of up to one year, most admissions are for 6 months or less.

In lieu of obtaining a B-1 visa, a business visitor may travel to the U.S. visa-free under the Visa Waiver Program (VWP), if the individual is a citizen of one of 38 countries (including Germany) whose nationals are eligible to participate in the program. VWP travelers must first obtain pre-approval online through the U.S. Department of Homeland Security's Electronic System for Travel Authorization, or "ESTA." Travelers entering on VWP are admitted for

90 days and generally are not eligible to extend or change their status.

Regardless of whether an individual enters the U.S. on a B visa or visa-free through the VWP/ESTA process, the types of permissible activities are the same. Business visitors of either type are limited to engaging only in activities permissible in business visitor status, as outlined above.

## **Conclusion**

As the above discussion illustrates, the B-1 business visitor category can be deceptively complex. The facts of each particular case, and each particular trip, need to be carefully examined to determine whether the planned activity qualifies as a legitimate business activity suitable for B-1 business visitor classification, or whether it crosses over into productive work that requires a work visa of some kind. While most scenarios will fall clearly into one category or the other, there will always be gray areas that entail some level of uncertainty.

A wrong decision on visa strategy in one of these cases could lead to a visa denial, or a possible denial of admission at the U.S. port of entry, and a pattern of abusing the B-1 business visitor category could even result in enforcement actions and possible severe civil, and even potentially criminal, sanctions. As such, it's critical for employers to retain competent immigration counsel to help them make sense of the sometimes arcane rules surrounding the B-1 business visitor classification and help devise strategies that will facilitate international travel by company personnel while limiting the risks that could flow from incorrect or improper usage of this important visa category.